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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 28,
Petitioner,

VS.

KARIN SERITIS and TERRI DELOACHE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE

J. THOMAS BOWEN
DAVIS, COWELL & BOWE
100 Van Ness Avenue,
Ninth Floor
San Francisco, CA 94102
(415) 626-1880

JOHN A. SLEZAK
IVERSON, YOAKUM, PAPIANO & HATCH
611 West Sixth Street,
Suite 1900
Los Angeles, CA 90017
(213) 687-0711
Attorneys for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeal affirming awards of punitive damages totalling $100,000.00 for a breach of the duty of fair representation under the National Labor Relations Act is barred by the decisions of this Court in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979) and *Bowen v. United States Postal Service*, 459 U.S. 212 (1983), which interpret federal labor policy to prohibit an award of punitive damages on such a claim?

2. Whether the judgment in favor of plaintiff DeLoache on her cause of action for intentional infliction of emotional distress, which was based upon the trial court's express finding that Local 28's discrimination in employment opportunities was the actual and proximate cause of her injury, is preempted by the National Labor Relations Act, in accordance with the preemption doctrine enunciated by this Court in *Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977)?

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KARIN SERITIS and TERRI DELOACHE,
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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE

Hotel and Restaurant Employees and Bartenders Union, Local 28, defendant and petitioner, (hereinafter "Local 28"), prays that a writ of certiorari issue to review the decision of the California Court of Appeal, First Appellate District, Division One, filed April 22, 1985, in this proceeding.

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division One, initially reported at 167 Cal.App.3d 78, appears in Appendix A hereto.

A timely petition for rehearing was filed in the Court of Appeal and, after an answer to the petition was filed, was denied without modification of the opinion. (Appendix B)

A timely petition for review was filed with the California Supreme Court on June 3, 1985. On August 15, 1985, the California Supreme Court denied review, but directed that the

Court of Appeal's decision not be published in the California Official Reports. (Appendix C).

The Court of Appeal's opinion and the orders of the Court of Appeal denying rehearing and of the California Supreme Court denying review are set forth in the Appendices hereto.

JURISDICTION

The order of the California Supreme Court denying review of the Court of Appeal's decision was filed on August 15, 1985. This petition for a writ of certiorari is filed within ninety days of that date. This court's jurisdiction is invoked under Title 28 U.S.C. Section 1257(3).

STATUTORY PROVISIONS INVOLVED

Title 29, U.S.C. Section 158(b)(2):

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such an organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ."

Title 29, U.S.C. Section 159(a):

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

STATEMENT OF THE CASE

This is an action by Karin Seritis and Terri DeLoache (hereinafter collectively referred to as "plaintiffs" and individually by their surnames) against Hotel and Restaurant Employees and Bartenders Union, Local 28, an unincorporated labor organization (hereinafter "Local 28"), and Ray Lane, its former chief executive officer.[1] It was filed November 18, 1976, in the Superior Court of the State of California for the County of Alameda. After Local 28's demurrers were twice sustained, trial proceeded on causes of action for Local 28's breach of its duty of fair representation and intentional infliction of emotional distress (CT 56-63).[2]

Trial was intially held on February 4 through 7, 1980, before the Alameda County Superior Court (RT I 1). The court issued a Memorandum of Decision deciding the case on March 10, 1980. In that decision it found for both plaintiffs on the cause of action for breach of the duty of fair representation and for plaintiff DeLoache only on the cause of action for intentional infliction of emotional distress (CT I 256-257). Plaintiff Seritis' claim on that basis was held barred by the statute of limitations (CT I 254-259).

Each plaintiff was awarded $25,000.00 in general damages and $50,000.00 in punitive damages for the breach of the duty of fair representation and DeLoache awarded general damages of $25,000.00 and punitive damages of $50,000.00 jointly and severally against Local 28 and co-defendant Ray Lane on her claim for intentional infliction of emotional distress (CT I 254-

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[1] Lane appealed the judgment against him *in propria persona*. That judgment was affirmed by the Court of Appeal in an unpublished opinion filed June 3, 1983.

[2] There are two sets of clerk's and reporter's transcripts in the record below. The first relates to the trial of February 4-7, 1980; the second relates to the partial new trial of April 25, 1983. The references to the clerk's and reporter's transcripts will be CT I, RT I and CT II, RT II for the first and second trials, respectively. There is also a supplemental Clerk's transcript prepared pursuant to the Court of Appeal's order of March 29, 1984. It will be referred to as "Supplemental CT."

259). Judgment after Findings of Fact and Conclusions of Law was entered August 21, 1980. Local 28 timely moved for a new trial (CT I 349-409) which was granted only with respect to the award of punitive damages and their relation to Local 28's financial condition (CT I 514-518).

On April 25, 1983, trial was held before Judge Kroninger regarding Local 28's financial condition. On July 12, 1983, the Trial Court issued a "Statement of Decision" holding, as pertinent herein, that *Electrical Workers v. Foust, supra*, does not bar an award of punitive damages on a duty of fair representation claim where there is reckless, intentional and malicious conduct of a criminal nature; Local 28 is solvent and has sound financial prospects for the future; and due to the outrageous nature of the defendants' conduct and the financial condition of Local 28, there is support for the original award of $150,000.00 in punitive damages. On September 15, 1983, the Trial Court entered judgment "reinstating" the original judgment of August 19, 1980, in favor of plaintiffs Seritis and DeLoache against defendant Local 28 in full, awarding Seritis and DeLoache $50,000.00 each in punitive damages against Local 28 on their DFR claims, and awarding DeLoache an additional $50,000.00 in punitive damages against Local 28 on her emotional distress claim (CT II 418-421).

On September 21, 1983, Local 28 timely filed its notice of appeal from the judgment entered September 15, 1983 (CT 422-423). That appeal was decided by the Court of Appeal, First Appellate District, on April 22, 1985. (Appendix A hereto). On May 7, 1985, Local 28 filed a Petition for Rehearing in the Court of Appeal. The Petition for Rehearing was denied by the Court of Appeal's order filed May 20, 1985. (Appendix B).

On June 3, 1985, Local 28 filed a petition for review of the Court of Appeal's decision with the California Supreme Court. On August 15, 1985, the California Supreme Court denied the petition but directed that the Court of Appeal's decision not be published. (Appendix C).

STATEMENT OF FACTS

Plaintiffs Karin Seritis and Terri DeLoache were at the time of the incidents forming the basis of their claims eighteen year old women (RT I 10, 85). Local 28 was and is a San Francisco Bay Area trade union which is the exclusive bargaining representative of waitresses and other related occupations working under collective bargaining agreements within its jurisdiction (Exhibit I 7, 8). Under those agreements, waitresses generally were referred to employment directly through Local 28 (*Id.*). Both Seritis and DeLoache were at various times members of the union (RT I 21-22; 84).

Ray Lane was the chief executive of Local 28. He characterized himself at the trial as having "the most powerful position in the union" (RT I 288), with duties "to oversee" its entire operation (RT I 248:26).

Soon after Seritis joined Local 28 in 1974, she spoke to Lane about a grievance with her employer, and her need for a waitress job (RT I 84). He asked if she would be interested in other "well-paying jobs" (RT I 86) which "had to do with my having sex with men, women, and animals" (RT I 88). Seritis declined these jobs.

Seritis then obtained a job as a waitress (RT I 93). But she was soon "fired" and a business agent of Local 28 told her: "I've heard you were pulled off your job . . . by Mr. Lane personally" (RT I 139). She was off work for sixteen days from that job and was later returned to it on a referral from Local 28 (RT I 96).

A year or two after the above incidents concerning Seritis, DeLoache similarly found herself with a grievance against her employer over the loss of her job (RT I 10). She went to the union hall where she met Lane. Lane said he would get her a better job and suggested that they meet in a nearby coffee shop the following day (RT I 13).

At the meeting, Lane complimented DeLoache on the size of her breasts, asked whether she "swung" and offered her a variety of sexually oriented employments virtually identical to that offered to Seritis (RT I 15-16). DeLoache refused such

employment and requested referral to work as a waitress (RT I 18).

DeLoache filled out a union referral card indicating that she needed a waitress job (RT I 14). While others over the years were regularly referred to such jobs DeLoache, with one exception, was not (RT I 21). During her visits to the union hall hoping for a job, she was asked by Lane if she was "ready to swing" (RT I 21). DeLoache lived with a roommate who was employed as a waitress through Local 28. The roommate was called "everyday" by Local 28 with job offers. "She'd say, 'Well, that's really not what I'm interested in, but can I send my roommate DeLoache.' " But DeLoache was not acceptable, and she never again received job offers from or through Local 28 (RT I 25).

In Findings of Fact ("Findings") filed after the initial trial herein, the Trial Court found petitioner's "discriminatory conduct in failing to accord plaintiff DeLoache the benefit of the same job placement services it gave to others who were similarly situated was the actual and proximate cause of injury and loss to plaintiff DeLoache" (CT I 311, Finding No. 51). It struck from proposed Findings of Fact submitted by plaintiffs a finding that Lane's sexual propositions and solicitations for prostitution, standing alone, constituted the outrageous conduct necessary to support her state tort law recovery (CT I 309, proposed Finding No. 41).

At the partial new trial of April 25, 1983, it was established that Local 28 is a labor union with approximately 4,200 members (RT II 19:9-11). Its sole sources of income are dues, initiation fees and reinstatement fees from members (RT II 22:10). It employs a well-trained staff to represent its members and enforce its contracts. Any reduction in Local 28's staff would curtail the efficient enforcement of its contracts and thereby reduce the members' and the Local's income (RT II 26-28).

During the years 1980, 1981 and 1982 Local 28 had an annual net income of less than $10,000.00. For the calendar year 1982 Local 28 had cash receipts of $688,373.00, cash disbursements of $681,221.00, and a net income of $7,149.00 (CT II 1157). In 1981 Local 28 had cash receipts of $667,550.00, cash

disbursements of $658,430.00, and a net income of $9,120.00 (CT II 1162). In 1980 Local 28 had cash receipts of $687,873.00, cash disbursements of $722,574.00, and a *negative* net income of $34,701 (CT II 1168; see also RT II 92-94).

Local 28's assets at the time of the new trial amounted to between $626,758.00 and $676,758.00, depending upon whether a then-pending $49,800.00 claim against United States Fidelity and Guarantee Company was included in the calculation thereof (RT II 67:19; 83:26-27; 84:24-26; CT II 1156-1160, especially 1158—Exhibit A, p. 4).

As of December 31, 1982, Local 28's total liabilities not including any amount for its unfunded death benefit liability (RT II 67:20-28), totalled $188,101.00 (RT II 69:7). Therefore, as of the retrial Local 28's net worth, without considering its obligation to pay death benefits, was between $438,657.00 and $488,457.00.

At the time of the partial new trial Local 28 was contingently liable for the payment of death benefits totalling over $1,250,000.00 (RT II 48:4-7). Local 28 was obligated to pay death benefits to the beneficiaries of approximately 1,600 persons in amounts ranging from $550.00 to $1,000.00 (CT II 194-195). During the years 1980 through 1982 it had paid in excess of $120,000.00 in such death benefits (RT II 89:26-28; CT II 1159, 1164, 1170).

Local 28's expert actuary calculated the present value of Local 28's obligation to be $377,578.00 (RT II 48:17) and opined that said obligation should be treated as a current liability in determining Local 28's net worth (RT II 50:27-51:11). Plaintiffs' actuarial expert projected that present value at between $193,000.00 (RT II 130:13-15) and $239,000.00 (RT 114:20-21) depending upon the rate of attrition assumed.

Based on the actuarial estimates of $193,000.00 or $239,563.00 provided by plaintiffs' expert, Mr. Moore, Local 28's net worth would be $245,657.00 or $199,094.00, respectively. If Local 28's present assets and liabilities ($438,657.00) are reduced by the actuarial present value of $377,758.00 calculated by petitioner's expert, Abrams, its net worth would be $61,079.00.

REASONS FOR GRANTING THE WRIT

A. THE CALIFORNIA TRIAL AND APPELLATE COURTS, BY AWARDING $100,000 IN PUNITIVE DAMAGES AGAINST LOCAL 28 ON PLAINTIFFS' DUTY OF FAIR REPRESENTATION CLAIMS, REFUSED TO FOLLOW THIS COURT'S HOLDINGS IN *FOUST* AND *BOWEN* BARRING PUNITIVE DAMAGES ON SUCH CLAIMS

The judgment of the Trial Court awarded punitive damages of $50,000.00 to each plaintiff on their respective causes of action for breach of the duty of fair representation. The Court of Appeal affirmed that judgment; the California Supreme Court refused to review it. Those decisions directly contradict this court's holdings in *Electrical Workers v. Foust, supra*, at 442 U.S. 42, and *Bowen v. U.S. Postal Service, supra*, at 459 U.S. 212, and must be reversed.

The right of a worker to fair representation by the union representing her is "implied from the grant to the Union by Section 9(a) of the National Labor Relations Act, 29 U.S.C. Section 159(a), of exclusive power to represent all employees of the collective bargaining unit." *Retana v. Apartment, Motel, Hotel & Elevator Operators Union, Local No. 14*, 453 F.2d 1018 at 1021-1022 (9th Cir. 1972). While the state courts have concurrent jurisdiction with the federal courts to hear such cases, *Vaca v. Sipes*, 386 U.S. 171 (1971), the substance of the cause of action is defined and controlled by federal law. *Vaca v. Sipes, supra*, 386 U.S. 171, 177.

This court has definitely ruled on the issue of whether or not punitive damages are available as a remedy in actions for breach of the duty of fair representation. In *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979) this Court held:

> Because general labor policy disfavors punishment, and the adverse consequences of punitive damages awards could be substantial, we hold that such damages may not be assessed against a union that breaches its duty of fair representation
>
> . . .

Id. at 442 U.S. at 52.

In reaching the holding that absolutely no circumstances justify an assessment of punitive damages against a union that breaches its duty of fair representation, this Court recognized that:

> Such awards could deplete union treasuries, thereby inpairing the effectiveness of unions as collective bargaining agents. Inflicting this risk on employees, whose welfare depends on the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have.
>
> *Id.* at 442 U.S. at 51.

Any question as to whether or not this holding is a *per se* bar to the award of punitive damages under any circumstances in a duty of fair representation case is answered by Justice Blackmun's concurring opinion in *Foust,* in which he correctly characterized the majority opinion as follows:

> The court now adopts a *per se* rule that a union's breach of its duty of fair representation can never render it liable for punitive damages, no matter how egregious its breach may be . . . The Court reaches to outlaw punitive damages in *all* unfair representation cases . . . (emphasis in original)
>
> *Id.* at 442 U.S. at 52-53.

This same issue was considered again by this Court in *Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983). There, Justice Powell, for the majority, wrote:

> In *Foust* we found that a union was not liable for punitive damages. The interest in deterring future breaches by the union was outweighed by the debilitating impact that unpredictable and potentially substantial awards of punitive damages would have on the union treasury. . .
>
> *Id.* at 459 U.S. at 227, n. 16; See also, n. 17.

Justice White, writing for three concurring and dissenting justices, agreed that:

> The *Foust* majority . . . further insulated unions from liability by holding that punitive damages could not be assessed in an action for breach of the duty of fair representation.
>
> *Id.* at 459 U.S. at 236.

Every circuit court of appeals to consider the *Foust* decision has concluded that it imposes a *per se* prohibition against the award of

punitive damages in an action for breach of duty of fair representation. "[T]he ban on punitive damages is not limited to the arbitration and grievance context but applies to all fair representation actions." *Peterson v. Airline Pilots Association*, 759 F.2d 161 (4th Cir. 1985). See *Dependahl v. Falstaff Brewing Co.*, 653 F.2d 1208, 1216 (8th Cir. 1981); *Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1106-1107 (6th Cir. 1981); *Alexander v. International Union of Operating Engineers*, 624 F.2d 1235, 1240 (5th Cir. 1980); *Wells v. Southern Airways, Inc.*, 616 F.2d 107, 109, n. 1 (5th Cir. 1980); *Drobena v. NLRB*, 612 F.2d 1095, 1098, n. 7 (8th Cir. 1980); *Quinn v. DiGuillian*, 739 F.2d 637, 647 (D.C. Cir. 1984).

The California Court of Appeal attempted to justify its affirmance of the judgment awarding punitive damages on plaintiffs' duty of fair representation claim by reference to entirely inapposite federal decisional law awarding punitive damages on Landrum-Griffin Act claims. (Appendix A) However, this Court noted that it had *implied* the duty of fair representation:

> "... from the National Labor Relations Act ... 29 U.S.C. Sections 151 *et seq.* ... because that statute, like the Railway Labor Act, affords unions exclusive power to represent all employees of a bargaining unit ..."
>
> *Foust, supra*, 442 U.S. at 47.

As such, Congress had not specified what remedies were available in duty of fair representation suits and it was this Court's function to implement a remedial scheme which would best effectuate the statute's purposes. *Id.* at 442 U.S. 47.

In contrast, the Landrum-Griffin Act, Title 29 U.S.C. Sections 401-531 is titled the "Bill of Rights of Members of Labor Organizations" [Title 29 U.S.C. Section 411] and seeks to protect members of labor unions in their relationships with their union by insuring procedural due process to members subject to union discipline and generally providing for democratic processes in the conduct of union affairs. *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 388 U.S. 175, 194 (1967).

This Court in *Foust* expressly distinguished its *per se* rule prohibiting punitive damages in a duty of fair representation

action from a Landrum-Griffin Act action. After declaring that "punitive damages may not be assessed against a union that breached its duty of fair representation" (*Id.* 442 U.S. at 52), this Court specifically declined to decide the propriety of punitive damages in suits under the Landrum-Griffin Act:

> Contrary to the fears expressed in the concurring opinion . . . we express no view on the propriety of punitive awards in suits under the Landrum-Griffin Act. We are concerned here with judicially created remedies for judicially implied causes of action. Whether the explicit statutory language of 29 U.S.C. Sections 411 and 412 and the accompanying legislative history authorize punitive damage awards obviously involves different considerations.
>
> *Id.* 442 U.S. at 47, n. 9.

Consequently, decisions upholding awards of punitive damages under the Landrum-Griffin Act constitute no basis whatsoever for awards of punitive damages on the plaintiffs' action for breach of the duty of fair representation under the National Labor Relations Act.[3]

Finally, although the Court of Appeal relies upon it at length, the decision of the trial court in *Anderson v. United Paper Workers International Union*, 484 F.Supp. 76 (D.Minn. 1980) does not support an award of punitive damages, given this Court's holdings in *Foust* and *Bowen*, as well as the subsequent history of the *Anderson* case. *Anderson* was reversed on appeal on the related issue that there was no causal relationship between the plaintiff's injuries and conduct of the union. *Anderson v. United Paper Workers International Union*, 641 F.2d 574 (8th Cir.

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[3] As such, all cases cited by the Court of Appeal where punitive damages were awarded on Landrum-Griffin causes of action, to wit: *Parker v. Local Union 1466, United Steel Workers of America*, 642 F.2d 104, 107 (5th Cir. 1981); *Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299, 1305, n. 6 (9th Cir. 1979); *International Brotherhood of Boiler Makers v. Braswell*, 388 F.2d 193, 200 (5th Cir. 1968); *Cooke v. Orangebelt District Council of Painters*, 529 F.2d 815, 818, 820 (9th Cir. 1976); do *not* support the affirmance of the award of punitive damages on review.

1981). However, the appellate court recognized the contradiction between the definitive *Foust* opinion and the reasoning of the trial court by noting:

> In their concurrence in *Foust*, four justices characterized the majority opinion as a *per se* prohibition of punitive damages against the union for breach of its duty of fair representation. . . . Because of the disposition of this case, it need not be determined whether *Foust* states a *per se* prohibition against punitive damages in fair representation cases, *although there is substantial authority supporting such a rule.*
>
> *Anderson v. United Paper Workers International Union, supra*, 641 F.2d at 581, n.9. (emphasis provided)

The "substantial authority supporting such a rule" referred to in *Anderson* was reiterated by this Court's decision in *Bowen* some two years thereafter. Consequently, the trial court decision in the *Anderson* case is only a discredited historical anomaly and can provide no basis for departing from the binding precedent established in *Foust* and *Bowen*.

The instant case presents the precise risk which prompted this Court to rule that punitive damages may not be assessed against a union that breaches its duty of fair representation. The crushing award of punitive damages will deplete Local 28's union treasury and result in the impairment, if not destruction, of Local 28's effectiveness as a collective bargaining agent for 4,200 innocent members, whose welfare depends on the strength of their union. Local 28 submits that "inflicting this risk on employees . . . is simply too great a price for whatever deterent effect punitive damages may have," *Electrical Workers v. Foust, supra*, at 442 U.S. 51, and respectfully urges that the $100,000.00 punitive damages award on plaintiffs' claims for breach of the duty of fair representation should be reversed.

B. THE CALIFORNIA COURTS' AWARD FOR PLAINTIFF DeLOACHE ON HER CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS VIOLATES FEDERAL LABOR LAW AS INTERPRETED BY THIS COURT BECAUSE HER CLAIM WAS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT

The trial court herein determined that Local 28's "discriminatory conduct in failing to accord plaintiff DeLoache the benefit of the same job placement services it gave to others who were similarly situated was the actual and proximate cause of the injury and loss to plaintiff DeLoache" (CT I 311, Finding No. 51). The trial court specifically refused to execute DeLoache's proposed Finding of Fact that sexual propositions and solicitations for prostitution, standing alone, constituted outrageous conduct in and of themselves and justified the award of damages (CT I 309, Proposed Finding No. 41). Thus, DeLoache's emotional distress was solely the result of Local 28's employment discrimination.

When the activities which a state purports to regulate are protected by Section 7 of the National Labor Relations Act (NLRA) or are prohibited as an unfair labor practice under Section 8 thereof, state law or regulation must yield to the NLRA and any state civil action must be dismissed. *San Diego Building Trades v. Garmon*, 359 U.S. 236, 244 (1959). The states are preempted from the arena of federal labor law because their presence would present "too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Id.* Discriminatory operation by a union of a hiring hall or job referral service has regularly been held to be an unfair labor practice subject to NLRB jurisdiction and thus preemption. *Teamsters Local 357 v. NLRB*, 365 U.S. 695 (1961); *NLRB v. Mountain Pacific Chapter of Associated General Contractors*, 270 F.2d 425, 430 (9th Cir. 1959).

In *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290 (1979), this Court created a narrow exception for those state causes of action for infliction of emotional distress which "can be adjudicated without resolution of the merits of the underlying labor dispute." *Id.* 430 U.S. at 304. However, this Court in *Farmer* cautioned that "the fact of

employment discrimination (as distinguished from attendant tortious conduct under state law) should not enter into the determination of liability or damages," *Id.* 430 U.S. at 305, n. 13, and concluded with a caveat directly applicable to the case at bar:

> *"Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state court tort action is based; to hold otherwise would undermine the preemption principle. Nor can threats of such discrimination suffice to sustain state court jurisdiction.* It may well be that the threat, or actuality, of employment discrimination will cause a union member considerable emotional distress and anxiety. But something more is required before concurrent state court jurisdiction can be permitted. Simply stated, *it is essential that the state tort be either unrelated to employment discrimination* or a function of the particularly abusive manner in which the discrimination is accomplished or threatened *rather than a function of the actual or threatened discrimination itself".* (emphasis provided)
>
> *Id.* 430 U.S. at 305.

The trial court herein expressly found that Local 28's discrimination in employment opportunities *did* form the underlying "outrageous" conduct on which DeLoache's action for infliction of emotional distress was based. It further concluded that Lane's sexual propositions and solicitations for prostitution, standing alone, did *not* constitute outrageous conduct and refused to execute DeLoache's proposed finding to that effect.

Consequently, DeLoache's recovery for intentional infliction of emotional distress is expressly based on the trial court's findings that it is *related to* and *a function of* Local 28's actual and threatened *employment discrimination.* It therefore falls far outside *Farmer's* narrow exception to preemption by the National Labor Relations Act. The Court of Appeal's affirmance of the judgment is similarly fatally flawed.

The *Farmer* exception has been strictly construed by the Courts of Appeal. In *Carter v. Sheet Metal Workers' Int'l Assn.*, 724 F.2d 1472 (11th Cir. 1984), a case closely analogous to

DeLoache's emotional distress claim, the Eleventh Circuit reversed an award for $150,000.00 based on a state tort claim for intentional infliction of emotional distress on the ground it was preempted by the NLRA. The *Carter* court concluded that "the instant case" does not satisfy the *Farmer* standard," *Id.* 742 F.2d at 1476, reasoning:

> "It is clear to us that the conduct or behavior of Local 13 and the International, which was the basis of the jury verdict in this case, is the same conduct or behavior which would support an unfair labor practice complaint filed with the National Labor Relations Board pursuant to 29 U.S.C. Section 158(b), which prohibits [*employment*] *discrimination* on any other ground except failure to pay dues. . . . *The federal preemption doctrine provides that a disputant in a labor union controversy cannot file an action in a state court based upon a common law or statutory ground if the facts essential to the state court cause of action are the same as those essential to an unfair labor practice complaint.* . . . Here Carter's Georgia lawsuit had as its essential facts the failure of Union Local 13 to issue him a reinstated union card and the International's complicity in such a refusal. Without these facts, Carter had no state cause of action. Yet, those same essential facts address only the existence of discrimination for some reason other than the nonpayment of dues, not the abusive manner in which it was carried out; therefore, they also make up the unfair labor practice claim. Accordingly, Carter's Georgia action is preempted." (Bracketed matter and emphasis provided)
>
> *Id.* 724 F.2d at 1477-1478.

The findings of the trial court herein, as noted above, are based precisely on facts essential to an unfair labor practice complaint, to wit: discriminatory operation of petitioner's job referral service. Those findings simply cannot support DeLoache's judgment for the state law tort of intentional infliction of emotional distress in light of the specific holdings in *Farmer* and *Carter*. Significantly, the Court of Appeal took little note of the crucial findings of the trial court in affirming its judgment. This Court should correct that unwarranted departure from its decision in *Farmer* and

reverse the awards of $25,000.00 in compensatory damages and $50,000.00 in punitive damages to DeLoache based on her preempted claim for emotional distress.

CONCLUSION

The decision of the California Court of Appeal affirming the award of $100,000.00 in punitive damages on plaintiff's claims for breach of the duty of fair representation is contradicted by uniform holdings of this Court and every Circuit Court of Appeals to consider the issue. The binding effect of those decisions requires a reversal of that decision. Plaintiff DeLoache's award of damages for intentional infliction of emotional distress, expressly based upon petitioner's discrimination in employment opportunities, is preempted by the National Labor Relations Act and must be reversed.

FOR THESE REASONS, petitioner prays that a writ of certiorari issue to review and reverse the decision of the California Court of Appeal.

J. THOMAS BOWEN
DAVIS, COWELL & BOWE

JOHN A. SLEZAK
IVERSON, YOAKUM, PAPIANO & HATCH

Attorneys for Petitioner

(Appendices follow)

Appendix A

In the Court of Appeal
of the
State of California
First Appellate District
Division One
A014245 & A024497
(Alameda County Super. Ct. No. 488584-7)

Karin Seritis and Terri DeLoache,
Plaintiffs and Respondents,
vs.
Hotel and Restaurant Employees and Bartenders Union,
Local 28,
Defendant and Appellant.

[Filed April 22, 1985]

Defendant Hotel and Restaurant Employees and Bartenders Union, Local 28 (hereafter Local 28), appeals from a judgment entered in the action of plaintiffs Karin Seritis (Karin) and Terri DeLoache (Terri), against Local 28 and one Ray Lane for damages for "intentional infliction of emotional distress" and breach of "the statutory duty of fair representation" imposed upon unions by the National Labor Relations Act, 29 U.S.C., section 185.

The superior court had concluded that Karin's claim of damages for intentional infliction of emotional distress was barred by the statute of limitations. The judgment, as entered, awarded *each* of the plaintiffs, Karin and Terri, against Ray Lane and Local 28, $25,000 in general compensatory damages, and $50,000 in punitive damages for breach of the duty of fair representation. Terri alone was awarded, against *both* defendants, an additional $50,000 in punitive damages for intentional infliction of emotional distress.

Both of the defendants thereupon moved for a new trial. Ray Lane's motion was denied, and that of Local 28 granted, on the *single* issue of "the relationship between its financial condition, and the amount of the punitive damage award." Ray Lane then

appealed from the entire judgment, and Local 28 appealed from the judgment, *except* that part as to which the new trial had been granted.

The appeals were assigned to this division of our court. Pending the appeals and on the parties' stipulation and request, we "stayed" the appeal of Local 28. Thereafter, by an unpublished, *and now final,* opinion, we affirmed the superior court's judgment as to Ray Lane.

The superior court has now retried the case's issue as to the amount of punitive damages, if any, to be awarded against Local 28. It has iterated, adopted, and confirmed its earlier judgment. Pending before, and now decided by, us are Local 28's earlier appeal, and its appeal from the superior court's more recent determination.

Having read and considered the record, and the briefs of the respective parties, we shall also affirm the judgment against Local 28. Our reasons follow.

In its appellate briefs, Local 28 selects evidence deemed favorable to itself, while completely disregarding all that is contrary. It becomes necessary to again state the substantial evidence rule by which Local 28, and we, are bound.

"Evidence, to be 'substantial' must be of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 576; *Estate of Teed* (1952) 112 Cal.App.2d 638, 644.) And, when a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *It is of no consequence that the trial court believing other evidence, or drawing other inferences, might have reached a contrary conclusion.* (*Grainger v. Antoyan* (1957) 48 Cal.2d 805, 807; and see *People v. Johnson, supra,* 26 Cal.3d 557, 576-577.)

We state the facts of the case as they were presumably found true by the superior court.

Karin and Terri were at the here relevant times 18-year-olds girls, fresh out of high school. They "had to find a job," and, as stated by Terri, "the only thing I knew how to do was to be a waitress."

Local 28 was and is a San Francisco Bay area trade union which, under collective bargaining agreements, had become the exclusive bargaining representative of waitresses, and other occupations, within its jurisdiction. And under the agreements, waitresses generally were employed directly through Local 28. Karin, and later, Terri, applied for memberships in Local 28. They were accepted as, and became, members of the union.

Ray Lane, although classified as its secretary-treasurer, was the *chief executive* of Local 28. He characterized himself at the trial as having "the most powerful position in the union," with duties "to oversee" its entire operation. He also declared "that he was a very powerful person, and he was the head of the union." Waitresses were allowed to work, and were placed in and removed from their jobs, at the discretion of Ray Lane. He boasted about his "underworld connections" and "that he could step on anybody." A recent vice-president of Local 28, who was "doing clerical work in the office," testified that Ray Lane directed him to "pull" waitresses "off the job."

And Ray Lane, as had others in Local 28, made known to Karin and Terri his authority and position of power in the union.

Soon after Karin had joined Local 28 in 1974, she spoke to Ray Lane about a grievance with her employer, and her need for a waitress job. He asked if she would be interested in other "well-paying jobs." Karin, of course, was interested. The jobs he then offered were "jobs [that] had to do with my having sex with men, women, and animals."

Karin declined the jobs, but Ray Lane persisted in his efforts to have her take one.

"[H]e proceeded to lay forth these job offers that he had in mind. . . . There was one arrangement with two gentlemen that

needed a live-in sexual playmate. There was a monthly salary attached to that. There [were] . . . fun trains to Reno. I was supposed to be a sexual playmate of business associates of his that would charter the car or the train. . . . He wanted to set me up in an apartment where I would be available for parties which he would occasionally have and friends he would bring over, my sexual services would be available. He would pay for the apartment. . . . Yes, he asked me to have sex with a dog. He said there was a dog up in Reno, or up in Nevada that performed copulation on stage with the women and he said that friends of his that he brought up, women he brought up couldn't wait to get their hands on and said he would love to see me making love to that dog. . . ."

Karin responded: " . . . I said that those weren't really the kind of jobs I had in mind. . . . He said he didn't have anything available as far as waitressing was concerned at the time, but he did have a lot of other jobs such as the ones I mentioned. . . ."

On her own accord, however, Karin was able to obtain a job as waitress. But she was soon "fired"; and a business agent of Local 28 told her: "I've heard that you were pulled off your job . . . by Mr. Lane personally." He (the business agent) testified: "I didn't know that she had been pulled off the job until she came down to the union hall, and then I was informed by Mr. Perluss [her erstwhile employer] that [Ray Lane] had taken her off the job." Although she continued to seek such employment, and other waitresses were employed through the union, Karin never again was employed through Local 28.

A year or two after the above incidents concerning Karin, Terri similarly found herself with an employer grievance, and the loss of her job. She went to the union hall where she met Ray Lane. Told about her misfortune, he said he would get her a better job, and suggested they meet in a nearby coffee shop the following day.

Upon so meeting, he complimented her on the size of her breasts, asked, "did I swing," and then said: "I don't know why you want to work as a waitress, . . . with a body like yours you could make a lot of money. . . . The first job he offered me was waitressing topless on a bus to Reno once a month. . . . He said I would make $500 to waitress topless on this bus once a month and

I would make more money if I wanted to do more. . . . [And] he wanted me to go on a convention to Washington, D.C. in March of that year and I would work as a prostitute at the convention and make $300 plus all my expenses. . . . He said he had a friend, a woman friend who was a lesbian who lived in Hawaii, that if I would live with her over there that she would get me a job in the best restaurant on the Island. [And:] He wanted me to go to Las Vegas and perform sex with a dog on the stage."

Terri kept saying: "No, I can't do that. Don't you have something? All I want to do is to be a waitress." Ray Lane said there were no waitress jobs.

Terri thereafter filled out a union referral card indicating she needed a waitress job. But while others over the years were regularly referred to such jobs Terri, with one exception, was not. The exception was a known "hangout" for prostitutes, which she declined. And during her many visits to the union hall hoping for a job, she was repeatedly asked by Ray Lane if she was "ready to swing." Terri lived with a roommate who was employed as a waitress through Local 28. The roommate was called "everyday" by Local 28 with job offers. "She'd say, 'Well, that's really not what I'm interested in, but can I send my roommate [Terri]?' " But Terri was not acceptable, and she never again received job offers from or through Local 28.

Seven other young women were witnesses at the trial. All testified to similar conduct by Ray Lane. One Mary who rejected his suggestions, despite repeated requests for jobs never received one. One Nancy, who turned down "prostitution" and "pornography" jobs, was warned not to tell anyone about Ray Lane's proposals; he said "there were ways he could quiet people." One Joni was told she would "never work in Oakland as a waitress." And some kept their jobs by going along with Ray Lane's suggestions. But one girl, after a time, refused to "go along with what Lane wanted her to do"; she was assigned to a different job with most unpleasant duties. Another "agreed to have sex with Ray Lane himself," but quit when he asked her to do other things

to which she could not agree; her job future thereafter does not appear.*

We observe at this point that many terms are used by the courts in describing the legal basis of punitive damages. Others were used by the superior court and plaintiffs Karin and Terri, in describing the conduct of Ray Lane. The terms are "oppressive," "malicious," "outrageous," "despicable," "arbitrary," "in bad faith," "discriminatory," "abusive," "criminal," and "wanton." Each, in our opinion, was supported by substantial evidence at the trial.

We now consider the several appellate contentions of Local 28.

I. *Contention:* Pervading Local 28's appellate briefs, appear arguments that there was no substantial evidence of malicious, oppressive, or outrageous conduct of Ray Lane, its chief executive officer. Under the evidence we have narrated, and the authority of *People v. Johnson, supra*, 26 Cal.3d 557, 576, *Grainger v. Antoyan, supra*, 48 Cal. 2d 805, 807, and *Estate of Teed, supra*, 112 Cal.App.2d 638, 644, the arguments are patently invalid.

II. *Contention:* "[Terri] DeLoache's action for infliction of emotional distress was based on Local 28's alleged discrimination in employment opportunities and therefore is preempted by the National Labor Relations Act."

The contention is contrary to established law.

In *Farmer v. Carpenters* (1977) 430 U.S. 290, the issue also was whether, by the National Labor Relations Act, "Congress intended exclusive jurisdiction to lie in the Board" in an action against a union for "intentional infliction of emotional distress." A union member had complained in "count two" of his California action that the union, in discriminating against him in employment opportunities, had "intentionally engaged in outrageous conduct, threats, and intimidation, and had thereby caused him to suffer grievous emotional distress." The court held that *ordinarily*

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* We are told, without apparent controversy, that since the above-narrated events, Ray Lane has twice been convicted of felonies unrelated to this case.

complaints of discrimination in the accommodation of the special interests of unions and members in the hiring hall context, lay in the exclusive domain of the National Labor Relations Board. But, said the court, where the tort is essentially "the particularly abusive [or 'outrageous'] manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself," a state action will lie. The union member was held to have stated a cause of action against the union defendant by count two of his complaint.

And, confronted with a similar contention to that here posed, the high court in *San Diego Unions v. Garmon* (1959) 359 U.S. 236, 243-244, stated: "[D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. . . . Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."

Under this authority we find the instant contention of Local 28 invalid.

III. *Contention:* "The judgments in favor of Seritis and DeLoache for Local 28's alleged breach of its duty of fair representation are not supported by the evidence and should be reversed."

Insofar as the contention is that neither malice, nor oppression, nor outrageous conduct was shown, as we have pointed out, it is palpably meritless.

But it embraces two other arguments.

The first is that "Local 28 was legally entitled to cause Seritis' discharge from employment for her nonpayment of dues and initiation fees."

It is observed that Local 28 concedes in its briefs that as to both Karin and Terri, each was a "*member of Local 28 at various times material to this action.*"

And the claimed nonpayment of dues resulted during and after Karin's employment, from which she was "pulled" by Ray Lane, and left without income. Moreover, before she was pulled off the job, her employer had asked Local 28's business agent for an extension of time for such payment; the business agent testified: "I told him that was fine with me." Under such circumstances the equitable doctrine of estoppel will reasonably apply.

The remaining argument of the instant contention is that: "There was insufficient evidence that Local 28 failed to accord either Seritis or DeLoache the same job placement services it gave others similarly situated." The argument is found frivolous.

As sort of an unrelated and otherwise unstated or argued addendum to the instant contention, Local 28 says only: "Moreover, any DFR claims based upon Seritis' first application in September, 1974 and DeLoache's in February, 1976 were barred by the six-month statute of limitations set forth at Title 29, U.S.C. § 160(b). See *Del Costello v. Int'l Brotherhood of Teamsters*, 76 L.Ed.2d 476 (1983)."

We observe first that Local 28's answer, upon which the trial's issues were drawn, alleged only that: "The causes of action alleged by the second amended complaint are barred by applicable statutes of limitations." Code of Civil Procedure section 458, providing—"In a pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section—(giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure;"—was wholly ignored.

Secondly, as to the instant argument we observe, contrary to the long existent requirements of rule 15(a), California Rules of Court, neither a "concise *heading* generally descriptive of the subject matter covered," nor "appropriate *reference* to the record," establishing that the point was raised in the trial court. Where such headings are absent the appeal is subject to dismissal.

(*Wallace v. La Vine* (1940) 36 Cal.App.2d 450, 452; *Milano v. Bulleri* (1932) 125 Cal.App. 72, 73-74.) And where there is no record reference establishing lower court error, we are not obliged to consider the point. (*Harbor Ins. Co. v. Resolute Ins. Co.* (1972) 23 Cal.App.3d 190, 197; *Metzenbaum v. Metzenbaum* (1950) 96 Cal.App.2d 197, 199.)

Nor does our reading of the single cited authority, *Del Costello v. Int'l Brotherhood of Teamsters*, lend aid to the otherwise unsupported argument.

We consider the point no further.

IV. *Contention*: "The judgments in favor of plaintiffs Seritis and DeLoache on their claims for breach of the duty of fair representation must be reversed because there is insufficient evidence to support the findings that it would have been futile for them to have attempted to exhaust their internal union remedies."

Here we note first, that Karin complained of the problems raised by Ray Lane and Local 28, to the National Labor Relations Board, and to a Mr. Hanley, the president of the Hotel and Restaurant International Union. The Board said it "couldn't go that far," and Mr. Hanley did not reply to her letter.

The trial court found that, with Ray Lane as Local 28's chief executive officer, it would have been futile for Karin and Terri to seek internal relief through Local 28. Under the evidence of the case that finding was certainly reasonable and proper.

Responding to a similar contention, the nation's high court in *Clayton v. Automobile Workers* (1981) 451 U.S. 679, 689, stated: "[C]ourts have discretion to decide whether to require exhaustion of internal union procedures. In exercising this discretion, at least three factors should be relevant: first, whether union officials are so hostile to the employee *that he could not hope to obtain a fair hearing on his claim*; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks . . . ; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. *If any of these factors are*

found to exist, the court may properly excuse the employee's failure to exhaust." (Emphasis added.)

V. *Contention:* "The trial court committed reversible error by refusing to specify the elements of the general damages awards of $25,000 each on plaintiffs Seritis' and DeLoache's claims for breach of the duty of fair representation."

From their very nature, the damages of Karin and Terri were, as argued by Local 28, "indefinite and uncertain" and therefore difficult of ascertainment. But beyond any doubt, the girls had been damaged substantially by Ray Lane's and Local 28's conduct.

"[I]t appears to be the general rule that while a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment. . . . The law only requires that the best evidence be adduced of which the nature of the case is capable. . . . [A]nd the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision." (*Dallman v. Southern Heater Co.* (1968) 262 Cal.App.2d 582, 594, and see authority there collected.)

No error is seen.

VI. *Contention:* "The trial court's conclusion that Local 28 ratified the malicious acts of defendant Lane and the portions of the judgment that award the plaintiffs punitive damages totalling $150,000 against Local 28 are unsupported by the findings and must be reversed."

The contention is a broad challenge to the trial court's conclusion that Local 28 was liable for the torts perpetrated on Karin and Terri by Ray Lane. Such liability does not exist, the union argues, unless the record shows that it "*ratified*" the conduct of Ray Lane.

Local 28 misapprehends the law.

Ray Lane, as heretofore noted, was the "*chief executive*" of Local 28; i.e., he held "the most powerful position in the union." And a labor union, in situations such as this, will be treated as a "*corporation,*" in that "it acts through and is bound by the acts of its officers." (*Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal.App.3d 908, 914.) And: "The trade union has grown from the early loose craft union into an institution comparable to a corporation or public utility. . . . This court has recently recognized the contemporaneous social responsibility of these organizations and the resultant legal amenability. . . . [W]e rejected as to labor unions the longstanding general rule that a member of an unincorporated association could not recover against the association for personal injuries sustained as a result of the association's negligence. The old approach regarded all members of the union as principals and agents or partners; hence, the negligence of any member would be attributable to any other member suffering injury. After analyzing the emerging entity status of a labor union, we concluded that the old rule could no longer be applied to unions. We also held that any judgment recovered from the union could be satisfied from the funds and property of the union alone." (*Daniels v. Sanitarium Assn., Inc.* (1963) 59 Cal.2d 602, 604-605.)

Ray Lane's conduct, within the scope of his authority, *whether or not in violatioin of his duties* became the *act of the union.* (*Schumann-Heink & Co. v. U.S. Nat. Bank* (1930) 108 Cal.App. 223, 232.) Such a chief executive officer is "more than an agent." "He acts and speaks for the [union] in furthering its express objects." (*Moore v. Phillips* (1959) 176 Cal.App.2d 702, 709; and see *Halbert v. Berlinger* (1954) 127 Cal.App.2d 6, 17; *Herring v. Fisher* (1952) 110 Cal.App.2d 322, 330.) And for the tort of such a chief executive officer, within the scope of his authority, "a member of a labor union . . . may successfully maintain an action" against the union. (*Inglis v. Operating Engineers Local Union No. 12* (1962) 58 Cal.2d 269, 270; and see *Coats v. Construction & Gen. Laborers Local No. 185, supra,* 15 Cal.App.3d 908, 915.) Patently, where as here, there was no higher Local 28 authority, no need or opportunity for *ratification* existed.

Moreover, Ray Lane's tortious conduct, among other things, attended Karin's and Terri's interviews with him concerning union-related jobs, and grievances against their employers. Such matters were manifestly within the scope of his duties as Local 28's chief executive officer.

And were we, *arguendo*, to find a need for Local 28's ratification of Ray Lane's conduct, it would be reasonably concluded that such a ratification had occurred. Here Local 28's officers generally were aware of Ray Lane's complained of conduct, and he was nevertheless continued in office. As said in *Coats v. Construction & Gen. Laborers Local No. 185, supra*, 15 Cal.App.3d at page 913: "([P]laintiff was assaulted by both [union agents] Rose and Andreoff on the Union premises, only being prevented from striking him by the intervention of others.) The evidence discloses that the Union by its conduct ratified the actions while having full knowledge thereof. Although informed of the actions of Rose and Andreoff, the Union did not repudiate them, in spite of the desire of the president to do so by discharging the two men. A reasonable inference is that the officers of the *Union ratified the actions of Rose and Andreoff*." (Our emphasis.)

VII. *Contention*: "The trial court's awards of $100,000 in punitive damages against Local 28 for the alleged breach of its duty of fair representation are contrary to the per se rule of law prohibiting punitive damages and must be reversed."

Local 28's reliance, for "the *per se* rule of law prohibiting punitive damages" against labor unions, is upon *International Bro. of Electrical Wkrs. v. Foust* (1979) 442 U.S. 42. That case concerned a union's negligent failure "properly to process [a member's] grievance alleging wrongful discharge by his employer." Punitive damages had been awarded the employee member against the union. The high court *held only* that, "such [punitive] damages may not be assessed against a union that breaches its duty of fair representation by *failing to pursue a grievance*." (Our emphasis.)

It appears that *International Bro. of Electrical Wkrs. v. Foust* is uniformly held as authority for *no more* than its holding.

Thus in *Anderson v. United Paperworkers Intern. U., AFL-CIO* (1980) 484 F.Supp. 76 (disapproved and remanded on other grounds, 684 F.2d 574), the court said (p. 85): "[T]he [*Foust*] court limited its holding to only those DFR [duty of fair representation] cases where the Union 'breaches its duty of fair representation by *failing properly to pursue a grievance.*' . . . It would appear that even if the court intended to create a *per se* rule in *Foust*, it would apply only where a Union failed to properly pursue a grievance. . . . In this case, the Union breached its DFR by misrepresenting to its rank and file members the true effect of their severance pay provision; based upon such misrepresentations, the employees consistently ratified successive collective bargaining agreements with the understanding that, under any circumstances, they would receive their severance pay. They would not have ratified the agreements had the true nature of the severance pay provision been revealed. Since this case does not involve a failure to pursue an employee's grievance, this court finds the ruling in *Foust* instructive, but not specifically controlling. . . . " The court then followed the pre-*Foust* rule of *Butler v. Local U. 823, Int. Bro. of Teamsters, etc.* (1975) 514 F.2d 442, 454, stating: "[T]he Union must engage in 'outrageous or extraordinary conduct' in order to award punitive damages. . . . This court finds that the jury could reasonably have determined that the Union's conduct constituted an extraordinary breach of the DFR; the jury's award will not be modified or vacated. Furthermore, it is precisely this type of Union misconduct that a punitive award is made for; this extraordinary remedy is necessary to deter the International Union from similar future violations. Accordingly, the judgment is neither modified nor vacated."

Shimman v. Frank (1980) 625 F.2d 80, 101, involved a member's beating, authorized or ratified by his union. Punitive damages had been awarded by the trial court against the union. The court said:

"As a threshold matter, the defendants argue that punitive damages are unavailable . . . . This issue is uncertain in light of the Supreme Court's recent decision in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979). There, the court ruled that punitive dam-

ages could not be awarded against a union which breached its duty of fair representation [in failing to pursue an employee's grievance against his employer.]

"The courts of appeals are unanimous on the issue, however. In *Int'l Brotherhood of Boilermakers v. Braswell*, 388 F.2d 193 . . . Judge Wisdom wrote that punitive damages are allowable on a showing of 'actual malice or reckless or wanton indifference' by a union for the rights of its members. *Id.* at 199. That holding has been endorsed by the second and *ninth* [our emphasis] circuits. *Morrisey v. National Maritime Union*, 544 F.2d 19; *Cooke v. Orange Belt District Council*, 529 F.2d 815. . . .

"This court, in *McCraw* [sic] *v. United Association of Journeymen & App. of Plumbing*, 341 F.2d 705, 706-07 . . . strongly suggested that punitive damages were unavailable under § 101. *McGraw*, however, has been subject to severe criticism by other courts. See *Feltington v. Moving Picture Machine Operators*, 605 F.2d 1251, 1257-1258 n. 4 . . . ; *Simmons v. Avisco Local 713*, 350 F.2d 1012, 1018. . . . See also *Hildebrand v. Bd. of Trustees*, 607 F.2d 705, 707, 708 n. 4. . . .

"We need not address *McGraw's* present viability. The reason is that the underlying conduct complained of was an assault and battery under Ohio law. Punitive damages are clearly available under this pendant state claim. . . . Indeed, punitive damages in such situations have become 'common-place.' "

And in *Parker v. Local Union No. 1466, United Steelworkers* (1981) 642 F.2d 104, 106-107, it was said: "[It is] argued however, that these actions did not constitute conduct sufficiently 'invidious' to justify punitive damages. We disagree. In *International Brotherhood of Boilermakers v. Braswell*, 388 F.2d 193, 199 . . . we held that punitive damages were awardable . . . if the union acted with 'actual malice or reckless or wanton indifference to the rights of the plaintiff.' . . . The Union's admitted disregard of the rights of its members amounts to reckless or wanton indifference to the rights of the members. Appellants' argument that the decision of the United States Supreme Court in *IBEW v. Foust*, 442 U.S. 42, . . . precludes an award of punitive damages is unpersuasive. In that case the majority specifically declined to

decide the punitive damages could be awarded under the LMRDA and confined its decision to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1976) 442 U.S. 42, 47 n. 9 . . . Justice Brennan, concurring in the result, noted that our decision in *Braswell* and those of other circuits have held punitive damages to be appropriate. . . . "

To the same general effect see: *Bise v. International Bro. of Electrical Wkrs.* (1979) 618 F.2d 1299, 1305-1306; *Maxwell v. United Auto. Aerospace & Agr.* (1980) 489 F.Supp. 745, 753.

No error is observed in the superior court's conclusion that: "The United States Supreme Court decision in *IBEW v. Foust,* 442 U.S. 42, does not bar the award of punitive damages in a case such as this, where the court has found reckless, intentional and malicious conduct of a criminal nature."

VIII. *Contention:* "The trial court's award totalling $150,000 in punitive damages against Local 28 are grossly disproportionate to Local 28's annual net income of less than $10,000 and its net worth of approximately $61,000 and should therefore be reversed."

On Local 28's limited new trial the superior court found "on conflicting evidence that defendant Union Local is solvent and has sound financial prospects for the future."

There was, as indicated by the trial court, much "conflicting evidence as to the *net worth* of Local 28. Some evidence indicated its net worth at around $450,000. But as we understand its contention, Local 28's liability for future death benefits to its members renders it insolvent, or nearly so. The death benefits, however, are not funded, and are paid generally from Local 28's current income from dues and initiation fees of its 4,200 members. There was actuarial evidence "that this union can expect to receive over the time period they will be paying out for . . . this death benefit," the sum of $39,156,000. And this liability for death benefits during that period was estimated at $7,182,541.

We discern no error in the superior court's conclusion that Local 28 "is solvent and has sound financial prospects for the future," or in the amount of punitive damages assessed against it.

Nor do we find merit in Local 28's claim that the superior court failed "to resolve" punitive damage issues, or to "consider" its net worth and current income.

The judgment against defendant Hotel and Restaurant Employees and Bartenders Union, Local 28, is affirmed.

CERTIFIED FOR PUBLICATION.

Elkington, J.

WE CONCUR:

Racanelli, P.J.

Holmdahl, J.

Appendix B

Court of Appeal of the
State of California
in and for the
First Appellate District
Division One
No. A014245
A024497
Alameda Co.
Superior Court No. 488584-7

Karin Seritis, et al.,
Plaintiffs and Respondents,

vs.

Hotel and Restaurant Employees
and Bartenders Union,
Defendant and Appellant.

[Filed May 20, 1985]

BY THE COURT:

The Petition for Rehearing is denied.

Dated May 20, 1985

Elkington, J., Acting P.J.

Appendix C

Order Denying Review
After Judgment by the Court of Appeal

1st District, Division 1, No. A014245/A024497

In the Supreme Court of the
State of California

IN BANK

Seritis et al., Respondents,

v.

Hotel and Restaurant Employees and
Bartenders Union, Local 28, Appellant.

[Filed Aug. 15, 1985]

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed April 22, 1985, which appears at 167 Cal.App.3d 78. (Cal. Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

BIRD
Chief Justice